*NOTE*

# MISSING THE MARK: *NYSRPA* AS A VEHICLE TO CLARIFY INCONSISTENCIES IN MOOTNESS DOCTRINE

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## INTRODUCTION

Federal mootness doctrine provides little guidance and predictability,[1] and the Court's vacillation between constitutional and prudential mootness is largely to blame.[2] The two approaches to mootness differ in important respects: Constitutional mootness treats mootness as a constitutional mandate that precludes exercising jurisdiction,[3] while prudential mootness relies on discretion[4] and practical considerations such as courts' equity powers, efficiency, and economy.[5] In some cases, outcomes "may depend on whether the mootness bar is understood as a prudential or constitutionally



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1. Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 564 (2009) ("Mootness doctrine, as currently constituted, does not provide the analytic tools necessary to explain or predict the results in a large number of mootness cases.").

2. *See id.* at 562 (arguing that mootness "lacks a coherent theoretical foundation" given the Court's vacillation between constitutional and prudential mootness).

3. *Id.* at 571–72.

4. BRIAN T. YEH, CONG. RES. SERV., RS22599, MOOTNESS: AN EXPLANATION OF THE JUSTICIABILITY DOCTRINE, 4 (2007) (citing Chamber of Com. v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980)) (noting that, unlike constitutional mootness, prudential mootness "address[es] not the power to grant relief but the court's discretion in the exercise of that power").

5. Hall, *supra* note 1, at 609 (noting that prudential factors include, at least, "(1) whether the policies that are typically said to be served by justiciability doctrines are sufficiently satisfied under the circumstances of the case; (2) the importance of adjudicating the issue or issues promptly; (3) the effect on judicial authority of hearing and deciding the claim; and (4) the effect on the efficient use of judicial resources of hearing and deciding the claim").

mandated doctrine."[6] Often, the Court's inconsistent use of constitutional and prudential mootness produces "dramatic variations in jurisdictional analysis" and results.[7]

In *New York State Rifle & Pistol Association, Inc. v. City of New York (*"*NYSRPA*"), New York City residents challenged in federal court a New York City ("City") ordinance that barred firearms transport across city lines to second homes and shooting ranges.[8] The Southern District of New York found that the law minimally burdened Petitioners' Second Amendment rights and subsequently dismissed the complaint.[9] The Court of Appeals for the Second Circuit affirmed the decision, and Petitioners subsequently sought *certiorari* from the Supreme Court.[10] But three months after the Court granted cert,[11] the City amended its ordinance to allow licensed firearms transport to non-City secondary homes and shooting ranges.[12] New York State then enacted a law prohibiting cities from adopting restrictions on licensed transport.[13] In response to these developments, the City filed a Suggestion of Mootness with the Court.[14] And in 2020, the Court held that the City's and State's regulatory amendments had mooted the case.[15]

This paper will analyze *NYSRPA* in light of the dichotomous federal mootness framework, assessing how *NYSRPA* engages with the constitutional and prudential mootness distinction. Ultimately, *NYSRPA* was a missed opportunity to clarify lingering uncertainties in mootness doctrine. The opinion did not mention or adopt either formulation outright, though the Court's reasoning appeared to affirm constitutional mootness as the basis for its decision. Still, *NYSRPA*

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6. *Id.* at 564.

7. Gene R. Nichol Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court*, 22 CONN. L. REV. 703, 714 (1990).

8. 38 R.C.N.Y. § 5-23(a)(3) (2019).

9. New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015), aff'd sub nom. New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018), vacated and remanded sub nom. New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York, 140 S. Ct. 1525 (2020).

10. Petition for Writ of Certiorari for Plaintiffs-Appellants, New York State Rifle & Pistol Ass'n, Inc. v. The City of New York, 140 S. Ct. 152 (2020) (No. 18-280).

11. *N.Y. State Rifle & Pistol Ass'n*, *Inc.*, 883 F.3d at 53–54 (2d Cir. 2018), *cert. granted,* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 139 S. Ct. 939 (2019).

12. 38 R.C.N.Y. § 5-23(a)(3) (2019).

13. N.Y. Penal Law § 400.00(6) (2019).

14. Suggestion of Mootness, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2019) (No. 18-280), 2019 WL 3451573.

15. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1526–27 (2020) (per curiam).

could serve as a springboard to clarify and constitutionalize mootness doctrine in line with the Court's existing jurisprudence. To make sense of how *NYSRPA* fits into the Court's jurisprudence, this Note will proceed as follows: Part I describes the Court's basic mootness framework. Part II analyzes inconsistencies caused by flip-flopping between the mootness approaches and juxtaposes two affirmative action cases to illustrate how the Court's mootness jurisprudence has produced different jurisdictional outcomes for similarly situated plaintiffs. Part III addresses the Court's use of these approaches in the related field of standing because, like mootness, prudential and constitutional elements of standing are muddied. Part IV focuses on *NYSRPA* and its doctrinal significance, and Part V argues for the adoption of the more predictable constitutional approach as the framework for federal mootness decisions.

## I. BACKGROUND

Mootness is but one element of Article III courts' jurisdiction inquiry. To exercise Article III jurisdiction, a case must present a proper case or controversy.[16] Absent a live case or controversy, a court's opinion would be merely advisory, thereby violating the court's constitutional mandate.[17] However, the Court has emphasized flexibility in the mootness doctrine and carved out three exceptions to mootness: voluntary cessation, capable of repetition yet evading review, and class actions.[18] Where an exception is satisfied, the court may exercise jurisdiction. Section A describes the basic mootness inquiry and its deeply intertwined sister doctrine, standing, and Section B focuses on mootness exceptions.

### *A. Current Legal Framework*

It is impossible to discuss mootness without briefly explicating the basic standing requirements. Mootness is often described as "standing in a time frame."[19] A legal interest must exist at the start of litigation

16. Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (holding where "a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so").

17. *See* Hall v. Beals, 396 U.S. 45, 48 (1969) ("The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.").

18. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 98–101 (3d ed. 2009).

19. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quotation omitted).

(standing) and must be "live" until the case is resolved (mootness).[20]

Standing requires (a) injury to a personal right that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (b) a causal connection between the injury and the challenged conduct; and (c) a "likelihood that the injury will be redressed by a favorable decision."[21] The standing injury requirement is often referred to as a personal stake.[22] Mootness doctrine adds a temporal requirement to that personal stake: To overcome mootness, the personal stake or interest must be extant at all stages of review, not just at the time the complaint is filed.[23] Without such interest, the court may not exercise jurisdiction and the case must be dismissed on mootness grounds.

With respect to the personal stake requirement, the Court has distorted the doctrine to decide questions of political and normative importance.[24] In *Roe v. Wade*, plaintiff McCorvey was no longer pregnant when the case reached the Court;[25] thus, her personal stake in the outcome had since expired.[26] Forced to operate within the confines of existing personal stake precedent, the Court engaged in analytical acrobatics to reach the merits.[27] The Court held that, because McCorvey could become pregnant again, pregnancy was capable of repetition yet evading review.[28] However, most women of a childbearing age may become pregnant at some point, so the proffered personal stake was really a generalized grievance.[29] In reaching the

20. *Id.*

21. N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663–64 (1993).

22. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 63 (7th ed. 2016) (using "personal stake" to discuss whether the personally suffered injury requirement is met).

23. *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 376 (1974) ("Mootness questions arise only once a court has determined, usually implicitly, that a litigant has standing to bring the action the doctrine of mootness requires that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (citing Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)).

24. Evan Tsen Lee, *Deconstitutionalizing Mootness*, 105 HARV. L. REV 605, 631 (1992).

25. Roe v. Wade, 410 U.S. 113, 125 (1973).

26. *Id.* at 171 (Rehnquist, J., dissenting) (arguing that exercise of jurisdiction requires a pregnant woman in her first trimester because plaintiffs cannot vindicate others' rights).

27. *See* Tsen Lee, *supra* note 24, at 631 ("It is unfortunate that the majority was forced to this kind of rationalization merely because it had the good sense not to deny the importance of the merits of those cases and because previous cases had frozen the personal stake requirement into Article III.").

28. Roe, 410 U.S. at 125.

29. Tsen Lee, *supra* note 24, at 624 ("[H]er personal stake could not have been the protection of her right to obtain an abortion in the future, because this stake ultimately collapses into a generalized grievance.").

merits on what amounts to a generalized grievance, the *Roe* Court essentially made an exception to the personal stake requirement.[30]

Similarly, the Court in *United States Parole Commissioner v. Geraghty* offered a broad interpretation of the requirement. In that case, the Court acknowledged that the named plaintiff's personal stake in the outcome was moot but found a personal stake in the procedural decision—class certification—satisfactory.[31] This rationale plainly deviated from precedent and the spirit of the requirement; it made little sense to find a personal stake not grounded in the litigation itself.[32] Thus, the Court warped the definition of personal stake to decide an issue of constitutional and normative import: the fair treatment of inmates.[33] In the opinion, the Court even recognized that its reasoning deviated from formalistic Article III requirements,[34] noting that *Geraghty* was not the first justiciability decision to suffer from this infirmity.[35]

### *B. Exceptions to Mootness*

Within this framework, the Court has carved out three exceptions to mootness: (1) voluntary cessation, (2) capable of repetition yet evading review, and (3) class action lawsuits.[36] Where an exception applies and jurisdiction is otherwise satisfied, the Court may reach the merits of the dispute.

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30. *Id. See also* Hall, *supra* note 1, at 564 (arguing the plaintiff in *Roe* failed to demonstrate the likelihood of being subjected to the same conduct).

31. U.S. Parole Comm'r v. Geraghty, 445 U.S. 388, 402 (1980) ("We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits expires, we must look to the nature of the personal stake in the class certification claim.") (internal quotations omitted).

32. Tsen Lee, *supra* note 24, at 625 (noting that the plaintiff would have no personal stake in class certification, "other than the satisfaction of inflicting a wound on the 'system' that wounded him").

33. *See id.* at 624 ("[T]he Court was straining to find a way to review the denial of certification.").

34. *See Geraghty*, 445 U.S. at 404 n.11 ("Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as 'flexible;' it has been developed, not irresponsibly, but 'with some care,' including the present case.") (citations omitted).

35. *See id.* ("The erosion of the strict, formalistic perception of Art. III was begun well before today's decision.").

36. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 123 (4th ed. 2011).

1. Voluntary Cessation

The voluntary cessation exception provides that a case is not moot if "the defendant voluntarily ceases the alleged improper behavior but is free to return to it at any time."[37] The court may discern an intent to reinstate a challenged provision from pleadings[38] or other conduct.[39] For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[40] the defendant-company dumped excessive mercury 489 times.[41] The Court cited this past "continuous and pervasive conduct" in its assessment of the reasonable likelihood that the conduct would reoccur.[42] In determining the likelihood that challenged conduct will resume, the Court applies a "stringent" standard:[43] A case is moot only "if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[44] Governments, unlike natural persons, are accorded some deference. Barring contrary evidence, the court presumes that governments do not act in bad faith and will not resume the alleged improper conduct.[45]

2. Injuries Capable of Repetition Yet Evading Review

The court may find an injury capable of repetition yet evading review where the injury is of short duration and will always likely evade review[46] or it is likely to recur because the plaintiff will likely be subject to the offending law again.[47] In *Moore v. Ogilvie*, candidates challenged an Illinois statute that required candidates to file a petition signed by

37. CHEMERINSKY, *supra* note 22, at 149.

38. Knox v. SEIU, Local 1000, 567 U.S. 298, 307 (2012) (finding that the union is likely to resume the challenged practices because it defended the practice in its petition).

39. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (weighing legislative reenactment of a different provision of the same law toward the possibility of reenacting the provision at issue).

40. 528 U.S. 167 (2000).

41. *Id.* at 176.

42. *See id.* at 184 (citing the pervasive nature of the conduct in the finding of injury-in-fact).

43. *Id.* at 189.

44. *Id.* (citing United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

45. Ne. Fla. Chapter of Ass'n Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 677 (1993) (O'Connor, J., dissenting) ("Unlike in *City of Mesquite,* in the ordinary case it is not at all reasonable to suppose that the legislature has repealed or amended a challenged law simply to avoid litigation and that it will reinstate the original legislation if given the opportunity.").

46. *See* Press-Enter. Co. v. Super. Ct. of Cal. for Riverside Cnty., 478 U.S. 1, 6 (1986) (holing case not moot because criminal proceedings are so short in duration that they evade review).

47. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 578 (1987) (finding injury capable of repetition but evading review because the mining company challenging the regulation would continue to be subject to the regulation as long as it kept operating).

at least 25,000 voters in order to be listed on an election ballot.[48] The plaintiffs failed to obtain the requisite signatures and were consequently omitted from the 1968 ballot,[49] and the relevant election occurred before the Court could hear the case.[50] Although it was impossible to grant retrospective relief, the Court found that the challenged conduct was capable of repetition yet evading review because "the burden . . . placed on the nomination of candidates for statewide offices remain[ed] and control[ed] future elections."[51]

To assert its jurisdiction, the Court has also abandoned certain elements of this exception. Courts will hear cases alleging wrongs capable of repetition yet evading review where there is no reasonable expectation that the challenged conduct will persist and continue to harm the particular plaintiff,[52] though articulated as a requirement.[53] Instead, courts reach the merits based on the "likelihood of recurrence to *others*."[54] In *Gerstein v. Pugh*,[55] the "*speculative* possibility" of a named plaintiff's rearrest, combined with the "certainty" that others would be subject to the same harmful procedures, sufficiently demonstrated the challenged conduct would likely reoccur.[56]

3. Class Actions

The class action exception allows courts to reach the merits of a class action even when the named class representative's personal stake in the matter has become moot.[57] The Court has reasoned that the class

48. 394 U.S. 814, 815 (1969).

49. *Id.*

50. *Id.* at 816.

51. *Id.*

52. *See e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973) (finding a right to abortion claim not moot because "[p]regnancy often comes more than once to the same woman, and in the *general population*, if man is to survive, it will always be with us") (emphasis added); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (stressing that "[a]lthough appellee now can vote, the problem to voters posed by the Tennessee residence requirements is capable of repetition, yet evading review").

53. *See e.g.*, DeFunis v. Odegard, 416 U.S. 312, 319 (ruling that the injury was not capable of repetition yet evading review because plaintiff "will never again" be resubjected to the challenge conduct); Hall v. Beals, 396 U.S. 45, 49 (1969) (ruling that the possibility of being resubjected to the challenged conduct by moving and then reestablishing residence within two months of a presidential election was a "speculative contingenc[y]" that did not rise to a likelihood of recurrence).

54. *See e.g.*, *Dunn*, 405 U.S. at 333 n.2 (1972); Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (finding the case not moot though plaintiffs could not be offered relief because the law controled future elections and will harm future candidates).

55. 420 U.S. 103 (1975).

56. *Id.* at 111 n.11.

57. Sosna v. Iowa, 419 U.S. 393, 402 (1975) (affirming that class actions are not moot if a

of unnamed persons described in the certification takes on its own legal status, separate from that of the named plaintiff.[58] On the basis of this independent interest in the outcome, a live controversy continues to exist for Article III purposes.[59]

## II. ISSUES INHERENT TO MOOTNESS DOCTRINE

Within the broader mootness umbrella, there are two formulations of the doctrine: constitutional mootness and prudential mootness. Applying either constitutional or prudential reasoning in mootness yields inconsistent jurisdictional outcomes because each is animated by different concerns with and conceptions of judicial power. Thus, Section A addresses how both prudential and constitutional mootness conceptualize the role of the courts within our federalist system. Section B highlights the tensions resulting from the lack of a unitary mootness approach by juxtaposing two university affirmative action cases.

### *A. The Source of Doctrinal Tension: The Prudential and Constitutional Mootness Distinction*

#### 1. Constitutional Mootness

The constitutional approach treats mootness as a mandatory bar to the exercise of jurisdiction.[60] Article III's language ultimately sets out defined parameters to judicial power that cannot be abrogated.[61] Accordingly, the Court cannot hear a case where there is no case or controversy defined in strict constitutional terms.[62]

Several justices have adopted this narrow interpretation of the case or controversy requirement, emphasizing that historical limits to the Court's power add color to the "case" and "controversy" requirement

controversy exists between a named defendant and a member of the class though the named plaintiff's claim is moot).

58. *Id.* at 399.

59. *Id.*

60. *See* Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.").

61. Hall, *supra* note 1, at 574 ("The corollary to this constitutional understanding of mootness is that courts lack power to create exceptions to the mootness bar. Because the doctrine is a jurisdictional bar mandated by the Constitution, the constitutional text must determine the bounds of the doctrine.").

62. *Id. See also Honig*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) ("I cannot believe that it is only our prudence, and nothing inherent in the [Constitution] that restrains us from pronouncing judgment . . . .").

imposed by Article III.[63] In *Honig v. Doe*, Justice Scalia emphasized in dissent that the "case or controversy" language is empty absent reference to traditional limitations on common law courts.[64] For him, the terms "[j]udicial [p]ower," "[c]ases," and "[c]ontroversies," import these historical limits on jurisdiction.[65] Justice Frankfurter took a similar position: He argued that the "cases" and "controversies" language extends judicial power only to those matters traditionally decided by the courts of Westminster.[66] He noted that the Framers drafted Article III with reference to "the familiar operations of the English judicial system and its manifestations . . . ."[67] Consequently, these customs inform the meaning of Article III.[68]

The Court first tethered mootness to the constitutional case or controversy requirement in *Liner v. Jafco, Inc.*[69] In a footnote, the Court declared that its "lack of jurisdiction to review moot cases derives from . . . Article III . . . under which the exercise of judicial power depends upon the existence of a case or controversy."[70] Here, the Court went farther than previous commentary on the source of mootness doctrine and anchored its analysis directly to constitutional language.[71] The Court's proposition that a moot case is not a case or controversy in the constitutional sense has been accepted in subsequent opinions.[72]

Proponents of the constitutional approach understand mootness exceptions as instances where, despite circumstantial changes, there remains a live controversy.[73] The exceptions are not mootness doctrine

63. *See Honig*, 484 U.S. at 340 (citing Justice Fields and the Framers to support the contention that the "case or controversy" requirement is defined by traditional limits on court power).

64. *Id.*

65. *See id.* ("Article III . . . adopts those limitations through terms ("The judicial Power;" "Cases;" "Controversies") that have virtually no meaning except by reference to that tradition.").

66. Coleman v. Miller, 307 U.S. 433, 460 (1939).

67. *Id.*

68. *Id.*

69. 375 U.S. 301 (1964). Prior to *Liner*, mootness rested on common law principles barring courts' from deciding cases where no dispute existed. *Mootness in the Supreme Court*, 88 HARV. L. REV. 373, 374 (1974) (citing Mills v. Green, 159 U.S. 651, 653 (1895)). The doctrine drew on efficiency and economy rationales, contending that the state should not "be burdened with the expense of trying such unsubstantial controversies." *Id.* (citing Searcy v. Fayette Home Tel., 143 Ky. 811, 812 (1911)).

70. *Liner*, 375 U.S. at 306 n.3.

71. Tsen Lee, *supra* note 24, at 612.

72. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam); North Carolina v. Rice, 404 U.S. 244, 246 (1971).

73. *See* Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (noting that Art. III "restrains us from pronouncing judgment in a case that the parties have settled, or a case involving a nonsurviving claim where the plaintiff has died, or a case where the law has been changed so

overrides; instead, they capture factual circumstances in which the Court has the constitutional power to exercise jurisdiction. According to Justice Scalia, "where the conduct has ceased . . . but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist" for Article III purposes.[74] Thus, in those circumstances, judgment on the merits is no more problematic than an ordinary grant of relief.[75]

2. Prudential Mootness

The prudential approach recognizes that mootness is not constitutionally mandated and instead turns on practical concerns.[76] Prudential mootness does not ask whether the Court has the constitutional power to grant relief; rather, it emphasizes the Court's *discretion* to exercise that power.[77] Pursuant to this formulation, the Court may "stay[] its hand" when a non-moot controversy is best resolved by other branches of government.[78] The Court treats such cases as moot for prudential reasons, not for failure to meet Article III requirements.[79] In its application of this approach, the Court is motivated by the desire to conserve resources,[80] preserve power,[81] and

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that the basis of the dispute no longer exists, or a case where conduct sought to be enjoined has ceased and will not recur"). Note, Justice Scalia recognizes that the "yet evading review" prong of the capable of repetition yet evading review exception is prudential though the probability of reoccurrence is essential to jurisdiction. *Id.*

74. *Id.*

75. *See id.* ("Where the conduct has ceased for the time being but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Art. III is no more violated than it is violated by entertaining a declaratory judgment action.").

76. *See* Chamber of Commerce v. U.S. Dep't of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980) ("In some circumstances, a controversy, not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.").

77. *See* Hall, *supra* note 1, at 564 (noting that prudential mootness treats dismissal as matters within the Court's discretion).

78. *Chamber of Commerce*, 627 F.2d at 291.

79. United States v. (Under Seal), 757 F.2d 600, 603 (4th Cir. 1985).

80. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191–92 (2000) (holding that "[i]n contrast [to standing], by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal"); Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) (citing the inefficiency of bringing separate claims in its mootness determination).

81. *See, e.g.*, U.S. v. Johnson, 319 U.S. 302, 305 (1943) (holding a suit lacking sufficient adversity "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process"); Walling v. Reuter Co., 321 U.S. 671, 675–78 (1944) (ruling that defendant's cessation of business and dissolution does not deprive the Court of the power to review appeals from the lower court judgment); Hall,

ensure that litigation is pursued by parties who are interested in the outcome and are properly motivated.[82]

A proponent of prudential mootness, Chief Justice Rehnquist believed that mootness cannot be a constitutional doctrine because there are exceptions to it[83] and because it is logically impossible to make exceptions to the Constitution.[84] The Chief Justice further stressed that the connection between mootness and the Article III case or controversy requirement is "attenuated," and "may be overridden where there are strong reasons" to do so.[85] Rehnquist framed mootness as an "unwillingness to decide moot cases," rather than an absolute impediment to jurisdiction.[86] Consistent with this permissive view, he proposed a new mootness exception grounded in efficiency:[87] The Court should hear moot cases where significant resources have already been expended and the Court could have reached the merits but for a change of circumstance.[88]

### *B. Current Mootness Doctrine Treats Similar Cases Dissimilarly*

Because the Court nevertheless *hears* cases that are moot, the Court has approached mootness in a way that is neither consistently constitutional or nor consistently prudential.[89] Rather, the doctrine has evolved into a chimera of both; mootness is highly malleable. This section explicates the practical reasons that drive the hodge-podge mootness framework and applies these principles to two similarly situated plaintiffs.

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*supra* note 1, at 568 n.21 (citing Coxe v. Phillips, 95 Eng. Rep. R. 152, 152 (1736)) (holding that attempt to conduct fictitious action was contempt of court).

82. Waite v. Dowley, 94 U.S. 527, 534 (1876) ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it."). *See also* Hall, *supra* note 1, at 570 (noting that courts applying prudential mootness historically considered "judicially economy, avoidance of party gamesmanship, and the desirability of resolving issues that were both substantively important and likely to recur" and consistently applied this framework until *Liner*).

83. Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, J., concurring) ("If it were indeed Art. III which . . . underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible.").

84. *Id.*

85. *Id.* at 331.

86. *Id.*

87. *Id.* at 332.

88. *Id.*

89. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976) (highlighting a set of mootness rules rooted in policy, rather the constitution). *See also* Flast v. Cohen, 392 U.S. 83, 97 (1968) (noting the "subtle pressures which cause policy considerations to blend into the constitutional limitations of Article III").

Some constitutional law scholars like Erwin Chemerinsky,[90] Alexander Bickel,[91] and David O'Brien[92] see justiciability doctrines like mootness as malleable tools to skirt (or confront) important social and political questions. Further, to encourage state experimentation with social policy, the Court exploits justiciability to avoid commenting on new laws.[93] By the same token, the Court may also avoid confronting the merits of politically divisive cases to safeguard and cultivate its legitimacy.[94] Within the separation of powers framework, the Court lacks the powers to implement its decisions,[95] so to ensure compliance with a particular decision, the Court must be able to compel compliance generally through its image and prestige.[96]

Moreover, the constitutional and prudential mootness distinction can be outcome determinative if the case is technically moot but there are compelling prudential reasons to hear the case anyway.[97] Two cases, *Defunis v. Odegaard* and *Fisher v. University of Texas (II)*, show how the doctrine's lack of a unitary theoretical approach produces disparate outcomes. *DeFunis v. Odegaard*[98] typifies the ways in which uncertainties in the doctrine can be manipulated to produce desired outcomes. *DeFunis* marked the first time that the Court took a case challenging a university's affirmative action admissions policy. In *DeFunis*, a white man denied law school admission under an affirmative action policy alleged discriminated in violation of the Equal Protection Clause.[99] DeFunis consequently sought an injunction commanding the school to admit him.[100] But by the time of the Court's review, DeFunis had been accepted to that law school and was in his

90. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 682 (1990) (noting that outcomes can turn on the Court's characterization of the justiciability issue).

91. EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA 157 (1st ed. 2011).

92. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 183 (Aaron Javsicas eds., 9th ed. 2011).

93. TSEN LEE, *supra* note 91, at 157.

94. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1108, 1139 (1995) (noting the Court's efforts to maintain its institutional prestige).

95. *See* O'BRIEN, *supra* note 92, at 27 (emphasizing that early abortion cases forced the Court to confront its limited power as "a political institution whose legitimacy is nonetheless perceived to depend largely on symbolism and reality of judicial independence"); *see also id.* at 337 (highlighting the Court's failed attempts to implement immediate and widespread school desegregation); *id.* at 314 ("Denied the power of the sword or the purse, the Court must cultivate its institutional prestige.").

96. Hellman, *supra* note 94, at 1139.

97. Hall, *supra* note 1, at 589.

98. 416 U.S. 312 (1974) (per curiam).

99. *Id.* at 314.

100. *Id.*

third year.[101]

The Court held that because DeFunis would "receive his diploma regardless of any decision this Court might reach on the merits,"[102] he had been accorded precisely the remedy he sought—admission to that law school.[103] And because DeFunis had secured the relief he had sought, "the controversy between the parties clearly ceased to be 'definite and concrete' and no longer 'touch[ed] the legal relations of parties having adverse legal interests.'"[104] Thus, the Court held that the case was moot.[105]

Cognizant of the mootness issue when the Court granted *certiorari*, the liberal justices had intended to reach the merits and validate affirmative action in universities.[106] However, Justice Powell held the swing vote and took a more centrist position than the other liberals, joining the conservative majority bloc.[107] He may have been deferring to the political process to normalize affirmative action, searching for a better case to advance his position, or buying time to refine his position.[108] Nevertheless, assured that DeFunis would be able to graduate,[109] the Court punted on a politically charged question and "announced a new principle: 'Difficult cases are moot.'"[110]

In this case, the Court framed the mootness inquiry in constitutional terms, first affirming the doctrine's constitutional moorings.[111] The Court held that "the inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power *depends upon the existence of a case or controversy*.'"[112] The Court elaborated that "[t]he starting point for [mootness] analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot

101. *Id.* at 315.
102. *Id.* at 317.
103. *Id.*
104. *Id.* Importantly, DeFunis did not seek class certification so the class action exception could not save his case from dismissal on mootness grounds. *Id.* at 314.
105. *Id.* at 320–21.
106. TSEN LEE, *supra* note 91, at 158.
107. *Id.*
108. *Id.*
109. *Id.* ("That [DeFunis would graduate from law school] was all the conservatives and Powell wanted to hear.").
110. CHEMERINSKY, *supra* note 36, at 123 (quoting DAVID CURRIE, FEDERAL COURTS: CASES AND MATERIALS 77 n.3 (4th ed. 1990)).
111. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam) (citing Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964), the seminal case wedding mootness to the Constitution).
112. *Id.* (citing Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964)) (emphasis added).

affect the rights of litigants in the case before them.'"[113] Limiting jurisdiction to cases where there is concrete adversity and shying away from abstract questions of politics and policy,[114] the Court tethered mootness rules to the "[*c*]*onstitutional limits*"[115] articulated in standing decisions. On its face, this framing rejects prudential mootness: If mootness is "derive[d]" from constitutional requirements and "depends on the existence of a case or controversy," jurisdiction cannot turn on prudential concerns like sunken litigation costs or threats to court power. Prudential concerns are extra-constitutional by definition.

However, the Court deviated from this constitutional articulation of mootness in *Fisher v. University of Texas II*,[116] relaxing the doctrine "as only a prudential model of mootness would permit."[117] In that case, the Court reached the merits of a university affirmative action case and did not raise the mootness question.[118] Like DeFunis, plaintiff Abigail Fisher sought injunctive and declaratory relief compelling the university to reconsider her application on a race-blind basis.[119] She too did not seek class certification and had graduated from another university before the Court could hear the case.[120] Already a graduate, the Court's ruling would have had no real effect on Fisher, just as a ruling would have had no real effect on DeFunis. Because DeFunis and Fisher were similarly situated, *DeFunis* should have controlled and *Fisher* should not have presented a live controversy. Nevertheless, the Court reached the merits and upheld the university's policy, ruling that the affirmative action policy was narrowly tailored to a compelling state interest in promoting diversity in higher education.[121]

On highly similar facts, *DeFunis* and *Fisher II* reached vastly different outcomes. The Court erected a high mootness bar in *DeFunis* yet bulldozed that mootness barrier in *Fisher II*. Absent a consistent and clear approach to mootness, the Court may manipulate mootness

113. *Id.*

114. The Court declined to comment on the state of affirmative action. *See id.* at 318 (generally noting the "public interest in having the legality of the practices settled" in cases of voluntary cessation without specific mention of affirmative action).

115. Allen v. Wright, 468 U.S. 737, 756 (1984).

116. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

117. Hall, *supra* note 1, at 589.

118. *Fisher II*, 136 S. Ct. at 2214 (upholding the school's policy because it satisfied strict scrutiny).

119. Brief for Respondent at 13, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6467640.

120. *Id.* at 18 (arguing that plaintiff's claim is moot because she had graduated from LSU and did not seek class certification).

121. *Fisher II*, 136 S. Ct. at 2214.

doctrine to reach or avoid questions of constitutional and normative import. This is where *NYSRPA*, had it constitutionalized mootness, could have injected consistency and predictability into the doctrine and where it failed.

## III. STANDING

To reiterate, standing and mootness are often inextricably linked in a court's jurisdiction determination. Like mootness, standing has been parsed for prudential and constitutional elements. Over time, the Court has mislabeled elements of standing, characterizing as "prudential" elements better understood as constitutional. The Court recently cast doubt on prudential standing in *Lexmark International, Inc. v. Static Control Components, Inc.*[122] In *Lexmark*, the Court reaffirmed standing's constitutional roots, emphasizing that standing rules derive from courts' limited power to decide "cases" and "controversies" and separation of powers principles.[123] From these principles, the Court noted that it has distilled requirements that comprise a "irreducible constitutional minimum of standing."[124] These standing requirements cannot be abrogated and, thus, the Court rejected the notion that it could reach the merits on prudential grounds.[125] The Court was clear that separation of powers limits federal court jurisdiction to only those cases pleading a particular injury to a personal right caused by the defendant,[126] a principle that runs through standing cases[127] and is helpful in understanding the concerns driving the Court's recent mootness decisions.

## IV. THE CONSTITUTIONAL-PRUDENTIAL DISTINCTION & *NYSRPA*

The constitutional/prudential mootness distinction can be outcome determinative if the case is moot but there are compelling reasons to reach the merits.[128] In the subset of cases where the distinction is determinative, courts can relax the doctrine to hear the case. "[W]hen

122. 572 U.S. 118, 127 (2014) ("Although we admittedly have placed [the "zone of interests"] test under the "prudential" rubric in the past, it does not belong there . . . .").

123. *Id.* at 125.

124. *Id.*

125. *Id.* at 128 ("We do not ask whether in our judgment Congress *should* have authorized Static Control's suit, but whether Congress in fact did so.").

126. *Id.* at 125.

127. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (emphasizing that separation of powers principles delineate the role of the judiciary and define justiciability doctrine).

128. Hall, *supra* note 1, at 589.

prudential factors strongly favor hearing a moot claim, courts find a way to hear the claim, even at the expense of distorting the doctrine"[129] —and predictability. *NYSRPA* falls within this subset of cases given the heated political discourse surrounding the underlying Second Amendment claim. Accordingly, this part (1) argues that the Court's mootness approach would have determined *NYSRPA*'s outcome, (2) analyzes the per curiam opinion for evidence of either constitutional or prudential mootness, revealing both a constitutional framing and analysis of mootness rules, and (3) parses the dissent and uncovers only a facially constitutionalized argument.

### *A. Why the Constitutional-Prudential Mootness Distinction Matters*

As a close and politically charged case, *NYSRPA* falls within the subset of cases where the distinction is outcome determinative. In *NYSRPA,* New York City residents challenged the City's prohibition on transport to non-City secondary homes and shooting ranges.[130] Three months after the Court granted certiorari, the City amended its ordinance to allow licensed firearms transport to non-City secondary homes and shooting ranges.[131] New York State then enacted a law barring cities from restricting licensed transport outside the city.[132] In response to these developments, the City filed a Suggestion of Mootness with the Court.[133] Both parties presented compelling arguments as to whether the voluntary cessation exception applied.[134] Petitioners contended that the City continued to micromanage their Second Amendment rights; thus, they argued that reassurances the City would not revert to the old regulations were suspect.[135] Rather than admit error,[136] the City cited the New York state law preempting

129. *Id.*

130. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 86 F. Supp. 3d 249, 257 (S.D.N.Y. 2015), aff'd sub nom. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018), vacated and remanded sub nom. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525 (2020).

131. 38 R.C.N.Y. § 5-23(a)(3) (2019).

132. N.Y. Penal Law § 400.00(6) (2019).

133. Suggestion of Mootness, *supra* note 14.

134. *See* Resp. to Respondents' Suggestion of Mootness at 22–23, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2019) (No. 18-280), 2019 WL 35458533451573. *See also* Suggestion of Mootness, *supra* note 14, at 19.

135. *See* Resp. to Respondent's Suggestion of Mootness, *supra* note 143, at 26 ("The City's postcertiorari efforts to insulate its actions from this Court's review thus provide no comfort whatsoever that it would not revert to its past ways once the threat of this Court's review has passed . . . .").

136. *Id.* at 25.

inconsistent city laws.[137] Because the City did not admit error, Petitioners argued that the change in City and State law was a product "of an acknowledged City-orchestrated effort to frustrate this Court's review"[138] and the Court could not be sure that the City would not reinstate its policy. Petitioners stressed that, in light of the dubious circumstances of the City's repeal and State's amendment, the City could not "begin to meet its heavy burden of proving that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[139] Therefore, Petitioners conclude that the voluntarily cessation exception applied.[140] Respondents argued that the voluntary cessation exception did not apply because the newly adopted State law provided for the transport of firearms outside the city and barred the City from passing rules inconsistent with state law.[141] So even if the City wanted to reinstate the old regulations, New York State law would prevent it from doing so.[142]

Further, pressing prudential considerations weighed in favor of a judgment on the merits. Justices Alito,[143] Gorsuch,[144] Thomas,[145] and Kavanaugh[146] stressed the need to address the Second Amendment claim, highlighting that the Court has yet to address lower courts' uneven applications of *District of Columbia v. Heller*.[147] Justices Alito, Gorsuch, and Thomas further emphasized the need to protect the Court's power and docket, arguing that the City's attempt to supplant the old regulations while the case was pending review "permits [the Court's] docket to be manipulated in a way that should not be countenanced."[148]

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137. *Id.* at 28.

138. *Id.*

139. *Id.* at 30 (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007)).

140. *See id.* at 33 (arguing that the City has failed to show mootness where there is voluntary cessation).

141. Suggestion of Mootness, *supra* note 14, at 17. Voluntary cessation doctrine requires a showing that the legislature will return to the old policy. *See id.* (clarifying that a party cannot evade judicial review by temporarily altering its behavior).

142. *Id.* at 19.

143. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.* (Kavanaugh, J., concurring).

147. *See* 554 U.S. 570, 581 (2008) (holding that the "Second Amendment right is exercised individually and belongs to all Americans").

148. *N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. at 1527 (Alito, J., dissenting).

### *B.* NYSRPA *and Theories of Mootness*

The *NYSRPA* majority decision is an exercise of constitutional mootness—the Court's language and reasoning evince as much. Where the language in *NYSRPA* is lacking, the Court's standing jurisprudence sheds light on the current state of mootness as articulated in *NYSRPA*. Certain parallels between the justiciability doctrines' animating concerns indicate that mootness doctrine, like standing, is constitutional at its core. Standing in particular suffers from the same infirmity as mootness: It too muddies the waters and mischaracterizes constitutional concerns as prudential.[149] Despite the muddled labels, standing jurisprudence focuses on whether plaintiffs "present[] issues with sufficient concrete adverseness to those whose invocation of the power of judicial review is most consistent with the constitutional premises regarding the proper role of the federal judiciary."[150] This section shows that *NYSRPA* was animated by the same fundamental concerns.

Recall, that in *NYSRPA*: (1) Petitioners sought injunctive and declaratory relief from the City's old ordinance,[151] (2) because the City rule was replaced, Petitioners had obtained to the precise relief they sought,[152] (3) granted the precise relief sought, there was no longer an injury caused by an adverse party for which the Court could provide a remedy.[153]

The first question is whether *NYSRPA* evinces either a constitutional or prudential approach to mootness. In its articulation of the mootness framework, the Court cited constitutionalized mootness rules,[154] suggesting that the Court meant to import a constitutional view of mootness, though this alone is not dispositive.[155] Importantly, the Court did not explicitly ground its articulation of mootness rules in

149. *See* Floyd C. Douglas, *Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 869–70 (1985).

150. *Id.* at 882.

151. *N.Y. State Rifle & Pistol Ass'n*, *Inc.*, 140 S. Ct. at 1526 (majority).

152. *Id.*

153. *See id.* (ruling that Petitioners have the "precise" relief they sought in their complaint).

154. *Id.* at 1527.

155. The Court cites *Lewis v. Cont'l Bank Corp.* and *Differender v. Cent. Baptist Church*. *Lewis* grounded the Court's jurisdiction in Article III, limiting jurisdiction to disputes in which "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." 494 U.S. 472, 475–76 (1990). *Differender* likewise couched mootness as a mandatory bar to jurisdiction, requiring the existence of a controversy to exercise jurisdiction. *See* 404 U.S. 412, 414 (1972) (ruling that the case "lost its character as a present, *live controversy* of the kind that must exist if we are to avoid advisory opinions") (emphasis added).

Article III or reference the case or controversy requirement, which are typically hallmarks of a constitutional mootness approach.[156] But nor did the majority reference prudential concerns such as courts' equitable powers, efficiency, and judicial economy.[157] So because the opinion itself provided few explicit clues as to the proper approach to mootness, the Court's formulation of standing doctrine may provide insight.

The parallels between mootness and standing reveal a constitutional theory of mootness. Although *NYSRPA* did not explicitly nod to the injury-in-fact requirement, the reasoning turned on a lack of injury caused by an adverse party. In ruling that the amended local and state laws, which allowed for transport to non-City second homes and shooting ranges, had provided Petitioners the precise relief they sought,[158] the Court indirectly ruled that Petitioners no longer suffered from the alleged injury. Thus, like constitutional standing decisions, *NYSRPA* hinged on the existence of a legally defined injury to a personal right. Again, like constitutional standing, *NYSRPA* denied court access to plaintiffs who did not plead sufficient concrete adverseness and echoed the Court's understanding of the judiciary's limited constitutional role.

Further, the Court's treatment of the new ordinance was consistent with broader constitutional standing precedent. In *NYSRPA*, the record was not sufficiently developed to ascertain the injury to Petitioners' Second Amendment rights.[159] The "continuous and uninterrupted" provision was not briefed and, as the record stood before the Court, the provision's meaning and the City's enforcement procedures remained unknown. Without this crucial information, it was not clear how and to what extent the City's new rule had injured or would injure petitioners. Consequently, as the record stood, petitioners did not allege injuries directly caused by the adverse party. Here too, *NYSRPA* represented another instance in which the Court refused to grant petitioners relief for want of concrete adverseness.

Much like the Court's constitutional standing cases, quintessentially prudential concerns did not animate *NYSRPA*. There was no reference

156. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. 1525 (failing to cite Art. III in articulation of mootness rules).

157. *See id.* (omitting reference to court power or litigation costs).

158. *Id.*

159. *See id.* (noting that, where plaintiffs have not had the opportunity to bring a claim under the new law, the Court vacates so that parties can amend pleadings and develop the record) (citing Lewis v. Cont'l Bank Corp., 494 U.S. 472, 482–83 (1990)).

to efficiency or sunk litigation costs. Justice Rehnquist found the economy rationale particularly persuasive where significant resources were spent to appeal to the highest court and the obstacle to review was a change in factual circumstances.[160] *NYSRPA* fit squarely within Rehnquist's criteria because it reached the highest court—SCOTUS—and a change in the law precluded review. But in spite of prudential considerations, the Court did not find injuries or damages under either the old or new ordinance and held the case to be moot. In this respect, the opinion rejected prudential reasoning.

In the face of strong prudential and practical policy concerns that weighed in favor of a judgment on the merits, the Court stuck to its constitutional guns. And although the Second Amendment issue was likely compounded by the impending presidential election, potential changes to the Court's composition,[161] and media coverage of police brutality and mass shootings, the Court addressed none of these considerations.[162] Furthermore, the case presented an opportunity to clarify *Heller*, as the dissent would have preferred.[163] The original ordinance was the first law of its kind,[164] and no other state has enacted such stringent laws regulating the transport of firearms.[165] Yet, the opinion did not highlight the immediacy of the Second Amendment question.

160. Nichol, *supra* note 7, at 705.

161. Justice Amy Coney Barret was confirmed in October 2020. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

162. Jill Cowan, Amy Harmon, & Nicholas Bogel-Burroughs, *Santa Clara Shooting is Another Nightmare Made Real*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/us/school-shooting-santa-clarita.html. *See also* Adam Liptak, N.Y. TIMES, *After School Shooting, Bill Focuses on Banks and Guns,* N.Y. TIMES, (Oct. 6, 2019), https://www.nytimes.com/2019/11/15/business/dealbook/banks-gun-crime.html ("The [C]ourt is going to have to decide this question of mootness against the backdrop of several recent highly-publicized episodes of gun violence and heated debate between the two parties about solutions to gun violence.").

163. *N.Y. State Rifle & Pistol Ass'n*, *Inc.*, 140 S. Ct. at 1527 (Alito, J., dissenting).

164. Robert Barnes, *New York Eased Gun Law Hopeful Supreme Court Would Drop Second Amendment Case — But That Hasn't Happened Yet*, WASH. POST (Aug. 11, 2019), https://www.washingtonpost.com/politics/courts_law/new-york-eased-gun-law-hopeful-supreme-court-would-drop-second-amendment-case—but-that-hasnt-happened-yet/2019/08/10/9031682e-bab6-11e9-a091-6a96e67d9cce_story.html ("The New York restrictions were unique — no other jurisdiction has such strict rules on transporting a weapon.").

165. *Id.*

### *C. The Dissent and Mootness*[166]

Although Justice Alito purported to engage with constitutional mootness,[167] the dissent is actually animated by prudential concerns. Justice Alito emphasized the Court's long silence on *Heller*[168] and the need to address lower courts' uneven applications of that precedent.[169] The dissent also regarded silence on the Second Amendment issue as an affront to the Court's power and legitimacy. Alito further stressed the need to protect the Court's power and docket, arguing that by amending the old regulations while the case was pending review, the City had effectively manipulated the Court's docket.[170]

The injury analysis in particular was by belied by a desire to reach the merits. Justice Alito grounded his analysis of the injury and request for relief in terms of harms caused by the new ordinance's "continuous and uninterrupted" transport requirement.[171] Focusing on how the "continuous and uninterrupted transport requirement" infringes on the Second Amendment right, Justice Alito reached the merits based on an injury Petitioners did not allege. Petitioners, as the majority noted, did not have the opportunity to challenge the "continuous and uninterrupted" transport requirement.[172] Rather, Petitioners sought the right to transport their firearms to non-City second homes and shooting ranges because the old ordinance categorically barred them from doing

166. This paper will focus on the dissent because the concurrence reaches the same constitutional understanding of the doctrine. *N.Y. State Rifle & Pistol Ass'n*, *Inc.*, 140 S. Ct. at 1527 (Kavanaugh, J., concurring).

167. Justice Alito acknowledged that mootness acts as a constitutional bar to jurisdiction: "Under the Constitution, our authority is limited to deciding actual cases or controversies, and if this were no longer a live controversy—that is, if it were now moot—we would be compelled to dismiss." *Id.* (Alito, J., dissenting). He explicitly noted that mootness is rooted in the case or controversy requirement. *Id.* Couching the existence of a live controversy as "compelling" the mootness outcome, Justice Alito also rejected the view that mootness is a matter of discretion as prudential mootness suggests. *Id.*

168. *See* 554 U.S. 570, 581 (2008) (holding that the "Second Amendment right is exercised individually and belongs to all Americans").

169. *N.Y. State Rifle & Pistol Ass'n*, *Inc.*, 140 S. Ct. at 1527 (Kavanaugh, J., concurring); *id.* (Alito, J., dissenting).

170. *Id.* (Alito, J., dissenting).

171. See *id.* at 1531 (characterizing the relief sought as unrestricted access to second homes and shooting ranges outside the city); *see also id.* at 1534–35 (finding that the less restrictive City rule did not remedy the injury because it did not provide unrestricted access).

172. *See id.* at 1526 (majority) (ruling that "where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully") (citing Diffenderfer v. Central Baptist Church of Miami, Inc., 404 U.S. 412, 415 (1972)).

so. [173] The new City and State amendments specifically provided for such a right.[174] Ultimately, because he did not apply a recognized exception to mootness doctrine, reaching the merits based on this reframing of the injury deviates from traditional constitutionalized mootness requirements.

## V. DISCUSSION

To reach the merits of important cases, the Court has advanced inconsistent reasoning. The need to adhere to precedent, combined with the fact that *certiorari* was granted because several justices wanted to reach the merits, has made the Court say "very silly and indefensible things."[175] Indeed, the Court's application of the mootness doctrine has undermined both the consistency and predictability of outcomes and the legitimacy of the Court itself.[176] To point to a few notable examples, *Roe* and *DeFunis* represent "dramatic variations in jurisdictional analysis."[177] When suitable, "[t]the Supreme Court lowers the mootness barrier to reach an abortion issue [in *Roe*] or bolsters it to put affirmative action on hold" in *Defunis*.[178] Because the Court manipulates mootness to reach (or, in certain cases, *avoid*) the merits, doctrine does not actually drive the analysis in cases where the approach—constitutional or prudential—is outcome determinative.[179]

The *NYSRPA* majority and dissent suffer from the same inconsistency as *DeFunis* and *Fisher II*. The majority in *Fisher II* neither cited prudential considerations nor applied a recognized mootness exception to reach the merits. Declining to apply a mootness exception, the *Fisher II* Court relied on ordinary justiciability principles to decide the merits. Applying fundamental mootness doctrine, no principled reasons—other than underlying prudential considerations—accounted for jurisdictional differences in *DeFunis* and *Fisher II*. Similarly, the *NYSRPA* majority and dissent did not expressly reference prudential concerns or apply the mootness exceptions; rather both purported to apply fundamental—and constitutional—principles and, yet, the majority and dissent came down on the mootness question differently.

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173. *Id.*
174. *See id.* (holding Petitioners had access to the precise relief sought).
175. Nichol, *supra* note 7, at 708.
176. *See* Hall, *supra* note 1, at 564 ("[M]ootness does not provide the analytical tools necessary to explain or predict the results in a large number of mootness cases.").
177. Nichol, *supra* note 7, at 713.
178. *Id.* at 714.
179. *See* Hall, *supra* note 1, at 564.

In *NYSRPA*, the difference in jurisdictional outcomes intimated that, while the dissent appeared to engage in constitutional reasoning, Justice Alito's was actually animated by prudential concerns.

Clarifying the correct approach to mootness would inject the predictability the doctrine desperately needs. Whether the Court affirms constitutional or prudential mootness, justices, judges, and scholars alike can work through a set of defined concerns and questions. With prudential mootness comes a distinct set of practical concerns (cost, efficiency, economy) and exceptions (the traditional exceptions to mootness). There is a limited universe of concerns that matter to the Court. Scholars and judges may make educated and reasoned assessments as to the weight the Court would assign to a particular concern based on other decisions, dicta, and the current sociopolitical climate. From these sources, we can ascertain what matters to a particular Court at a particular time and predict the outcome of a prudential mootness determination.

Though prudential mootness is not wholly unwieldy and provides flexibility to the Court to address partisan and politically charged constitutional claims, the constitutional approach to mootness brings added certainty and clarity, eliminating discretion from mootness determinations. Because constitutional mootness is constitutionally grounded, it sets out strict and clear parameters to guide courts, whereas prudential mootness looks to practical considerations and is a squishier rule. Proponents of prudential mootness may respond that flexibility allows the Court to track public opinion and remain accountable. Yet, flexibility and discretion are the source of doctrinal confusion. The Court ought not "lower[] the mootness barrier to reach an abortion issue or bolster[] it to put affirmative action on hold"[180] at the expense of theoretical consistency. Individual justices may weigh the costs spent on litigation, potential effects on courts' power or reach, and the importance of the underlying constitutional challenge very differently, particularly in close cases. Given their malleability, these factors may do little to discipline analyses. *NYSRPA*, had it affirmed constitutional mootness, could have served this disciplinary function and clarified the concerns and requirements underlying mootness inquiries.

180. Nichol, *supra* note 7, at 714.

## CONCLUSION

Prudential and constitutional mootness are always the foundation of mootness decisions. The Court has used both approaches and its uneven treatment of mootness questions has resulted in an inconsistent and unpredictable framework. Thus, to better understand the animating concerns undergirding mootness decisions, we must look to other justiciability doctrines. Standing provides some insight. Though the Court has mislabeled elements of standing, decisions appear to be grounded in constitutional rather than prudential concerns.[181] A closer look at mootness cases reveals a similar trend. Like standing, mootness decisions evidence principled discussions of constitutional requirements. *NYSRPA* is no outlier. Like recent mootness decisions, *NYSRPA* is an exercise in constitutional reasoning, focused on whether there is an injury for which the Court may offer relief within its constitutionally mandated role. Looking to the future of mootness doctrine, *NYSRPA* was a missed opportunity to clarify the proper theoretical approach to mootness and ground the doctrine in a predictable set of constitutionalized rules. Still, *NYSRPA* could serve as a springboard to affirm constitutional mootness, given the majority's distinctly constitutional tone and result.

181. *See* Douglas, *supra* note 158, at 882 ("The driving force of most of the Burger Court's significant justiciability decisions is not a concern with assuring the presentation of issues in a form suitable for judicial resolution, but a preoccupation with questions of separation of powers and federalism.").